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In The
Supreme Court of The United States
October Term 1997

ROCHELLE K. WHATLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the District Court erred in determining Petitioner's sentence by considering Petitioner 's acquitted conduct in its calculation in a manner inconsistent with this Court's decision in Watts, in that the District Court failed to state on the record if the acquitted conduct considered had been established by the government at trial by a "preponderance of the evidence."

II. Whether the District Court erred in issuing an Allen charge, after the jury had twice deadlocked, which substantially varied from the language the Eighth Circuit approved in Thomas, and was therefore coercive under this Court's decision in Allen and its prodigy, because the charge given failed to expressly restate the government's burden of proof, failed to ask both the majority and minority to review their positions, and failed to expressly recognize the possibility that the majority may be in favor of acquittal.

III. Whether the District Court erred in not setting aside Petitioner's conviction for money laundering under 18 U.S.C. § 1957, which requires the establishment of some "specified unlawful activity" as an essential element of the offense, which the government failed to establish when the jury acquitted petitioner of appellant of all counts of wire fraud.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this appeal are Rochelle K. Whatley, an individual, and the United States of America. In the Court of Appeals below, the appeal of Ms. Whatley was consolidated with the appeals of J. Victor Whatley, Michael Todd Landess and Harold B. Barnett, Jr. However, these individuals are not parties to this Petition.

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The opinion of the United States Court of Appeal for the Eighth Circuit, affirming the convictions rendered against Petitioner is reported at 1998 WL 2794, __ F.3d. __ (8th Cir. 1998). (Appendix A- 2)

The Eighth Circuit's denial of the Petition for Rehearing and Suggestions for Rehearing en banc, dated February 19, 1998, is not officially reported. (Appendix A - 2)

The Verdict Form of the United States District Court for the Western District of Missouri, convicting Petitioner is unpublished. (Appendix B -18).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 7, 1998, convicting Petitioner. Petitioner's Suggestion for Rehearing en banc was timely filed and subsequently denied on February 19, 1998. The Eighth Circuit treated Petitioner's filing as a Petition for Hearing by the panel and denied the same on February 19, 1998. This Court's jurisdiction to considered this petition is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS & STATUTES

United States Constitution, Amendment V

No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1957. **Engaging in monetary transactions in property derived from specified unlawful activity.**

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the

Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

18 U.S.C. § 3661. **Use of information for sentencing**

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

On December 12, 1995, a grand jury returned a 113 count indictment against Rochelle K. Whatley, J. Victor Whatley, Michael Adams, Sean T. Hutto, Harold B. Barnett, Jr., John Dillenger, Vance Fox, Curtis P. Adams, and Don L. White (collectively "the defendants"). Petitioner, Rochelle K. Whatley, was the only named defendant charged in each of the 113 counts. Count 1 alleged violation of 18 U.S.C. § 371 wherein the defendants allegedly devised and intended to conspire together to commit an offense against the United States, to wit: wire fraud. (Indictment, p. 2). Counts 2 - 107 alleged violation of 18 U.S.C. § 1343 wherein the defendants allegedly executed an intentionally devised scheme to defraud various individuals through out the United States of money in excess of $500,000 transmitted by means of wire communication in interstate commerce. (Indictment, p. 3, 16). Counts 108 - 113 alleged violation of 18 U.S.C. § 1957 wherein Ms. Whatley allegedly engaged in monetary transaction affecting interstate commerce which involved allegedly illegal proceeds of criminal derived property from a specified unlawful activity, to wit: wire fraud. (Indictment, p. 21).

On December 28, 1995 the defendants entered not-guilty pleas to the indictment and availed themselves of their jury trial rights. Thereafter, the defendants moved to suppress the search of the MMC offices, which was denied. Trial commenced on October 28, 1996 in the United States District Court for the Western District of Missouri. On or about November 7, 1996 the jury return a verdict of not guilty for

Rochelle Whatley on Counts 2 - 107 and Count 113. The jury did, however, return a verdict of guilty for Ms. Whatley on Count 1 and Counts 108-112. At a sentencing hearing on March 5, 1997, Ms. Whatley was sentenced to 63 months incarceration under the custody of the Bureau of Prisons and ordered to pay restitution totaling $220,908. Ms. Whatley subsequently filed an appeal in the Eighth Circuit Court of Appeals on May 27, 1997. A timely Notice of Appeal was filed on February 27, 1996, invoking the jurisdiction of the Eight Circuit Court of Appeals under F.R.A.P. 3 and 4(b), pursuant to the provisions of 28 U.S.C. § 1291. Ms. Whatley's appeal was denied on January 7, 1998. A motion for rehearing and suggestions for a rehearing en banc was denied on February 19, 1998.

Ms. Whatley's appellate brief presented eight (8) for review by the Eighth Circuit, three (3) of which petitioner believes presents meritorious consideration by this Court. The following factual background is stated chronologically.

Factual Background of the Case

On March 4, 1994, FBI agents seized all of the records and assets of a Saint Joseph, Missouri telemarketing firm, Midwest Marketing Co. (MMC), which was owned and operated by Ms. Whatley. On the December 6, 1994, twenty-one (21) months after the FBI raid, a grand jury indicted Rochelle Whatley and ten other individuals employed by MMC. The indictment was part of the government's nationwide crack down on telemarketing called "operation disconnect".

The grand jury which indicted Ms. Whatley was the

second grand jury impanelled by the government and heard only the testimony of one of the FBI agents involved in the seizure of records and assets. An earlier grand jury convened right after the raid heard testimony from a number of witnesses, including employees of MMC, and handed down no indictments.

1) MMC Business Operations

Midwest Marketing Corporation (MMC) was founded in May 1993 by Rochelle Whatley in her home town. At the time it closed, the company had been in business for only approximately nine (9) months, including start-up time. Contrary to inferences that the business was a fly-by-night boiler room operation, MMC was an attractive, well furnished and maintained office in a major commercial high-traffic area just off the North Belt Highway in Saint Joseph, Missouri. (Tr. III, 775-776 and Tr. IV, 855).

MMC was the first business Ms. Whatley owned or operated and from MMC's inception she conducted the business by the letter of the law. (Tr. IV, 850-51). She employed an attorney and a Certified Public Accountant to handle MMC's legal and tax responsibilities, including researching the rules and regulations for doing business in each State MMC operated in. (Tr. III, 850; Tr. IV, 815-818). MMC was a registered Missouri corporation set up as a "S" Corporation so that money that was taken out of the company was treated as a distribution of profits. (Tr. III, 631). The company had proper Federal Tax I.D. numbers and she made the proper S selection for tax treatment. (Tr. III, 645-646). All business transacted used a company checking

account, the statements of which were turned over to the accountant to prepare MMC's financial records. (Tr. III, 625, 648). She reported all income to the IRS (T 652, L 12-20), paid the appropriate Federal withholding FICA taxes and Social Security taxes for her employees, and she did the same for the State of Missouri. (Tr. III, 653).

Other evidence presented at trial indicates Ms. Whatley set up a 401(K) retirement plan (Tr. III, 658) for employees, that the company and its employees were insured with American Family Insurance Company -- including liability, medical and personal property protection -- and that workers' compensation insurance was purchased when required in 1993. In other words, every effort by ms. Whatley to run a legitimate business.

2) MMC Business Practice At Issue

The business practice questioned by the government concerned MMC's first no-obligation chance sales promotion program. A no-obligation chance sales promotion involves combining three or four large prizes (typically televisions, cars, and vacations) with a number of less expensive prizes (typically watches or home decorating items. These promotional prizes served as giveaways to sell other company products. Customers are guaranteed of winning at least one prize.

Prior to forming MMC, Ms. Whatley worked for a company called Pony Express International (PEI) which also conducted no-obligation chance sales promotion programs. PEI distributed promotional prizes through a two-tier prize system in which one of the smaller first-tier prizes were

always distributed to a customer as a sale was made. The larger second-tier prizes would then be distributed at the conclusion of the program when a designated number of sales had been reached. PEI set the odds for winning the larger prizes, based on the number of sales to be reached and distribute the smaller prizes; and one of the customers, who had already received a smaller prize, would then receive one of the larger prizes.

MMC's first no-obligation chance sales promotion involved the sale of "Say No To Drugs" (SNTD) products. Patterned after PEI's no-obligation chance sales promotions, the SNTD program combined small, less expensive prizes (the first-tier prize) with large, more expensive prizes (the second-tier prize) in conjunction with the sale of SNTD products. All customers who purchased SNTD products from MMC received one of the first-tier prizes at the time of sale. The SNTD program's second-tier prizes were to be given away once MMC had reached a set number of transaction -- in this case 2,000 transactions.

3) The Government's Case

The cornerstone of the government's case against Ms. Whatley for conspiracy, wire fraud and money laundering was the government's claim that she never intended to have the drawing for the major awards (the second-tier prizes) at MMC. The government stated as much in its opening statement when it alleged at three different times that the victims were only going to get the lesser prizes and that they had no chance to win the major awards (Tr. I, 5, 10, 13). The government claimed that because MMC knew everyone

would get the smallest award first, MMC would not have given away the large awards in a drawing once the 2,000 entries had been reached. Under MMC's program, the smaller promotional awards (the first-tier prizes) were given away at the time of sale, as evidenced by the government's own witnesses testified. (Tr. I, 222). The major awards (the second-tier prizes) would then be drawn for when 2,000 customer transaction occurred. All witnesses, both for the government and defense, testified as such. (Tr. IV, 946). Linda Mopping, a witness for the government given immunity from prosecution if she would testify, told the jury that Ms. Whatley described for her and two other employees the program of giving away the lesser award first and then when the company had so many customers having a drawing for the big items (Tr. II, 306). She went on to state that there was a place to write in a number for each transaction and as soon as a certain threshold was met [she believed 2,000] the company was going to give away the large awards. (Tr. II, 379, 359).

The government tried to suggest that there was <u>not</u> going to be a drawing for the major award, because the company had not yet purchased the car, the savings bonds, and there was no specific reserve set up placing the purchase money in trust (T 1109, L 1-3). At the time of the FBI raid, there was more than $13,000.00 [32.5% of $40,000] in MMC's bank account. (Tr. V, 1109) and only 673 [33.6% of 2,000] entries for the drawing. Ms. Whatley had fully researched the necessary requirements for the bond, the car and the cost of carrying out the drawing. (Tr. IV, 924-26,

929-30). The total cost to MMC to purchase all major awards was $40,000.00. The net cost after the tax deduction was only $26,000.00. (Tr. IV, 943-945). Further there was independent testimony offered that under applicable law, the car and the savings bonds could not have been purchased until after the winner's name was known. A local bank representative testified that before a United States Savings Bond could be issued, you must have the owner's name and Social Security number. (Tr. IV, 750-751). The government also stipulated that you cannot purchase a car in the State of Missouri until you know the name of the owner to put on the title. (Tr. IV, 789).

The government again told the jury during closing arguments that the major awards would not be given away by referring to it at least three times. (Tr. V, 1107-1109). However, the instruction the government submitted the case for conspiracy and wire fraud to the jury did not advance the theory that there was not going to be a drawing. In fact, the government abandoned the theory altogether in their post trial motion stating that this theory was never an integral part of the fraudulent scheme of the defendants. (Government's Response to Defendant's Motion for Acquittal, 11-12).

Rather, the government submitted the case as set out in instruction number 25. Instruction 25 alleged a scheme to defraud based on the active concealment of material facts. The alleged acts of concealment were: (1) that the value of the predetermined award was substantially less than the value of the other awards within which it was grouped; or (2) that the value of the Say No To Drugs promotional material was

substantially less than the donation allegedly procuring it; or (3) that the bulk of the donation was never directed to a Say No To Drugs campaign. However, there was never an instruction given stating that the defendants did or did not have a legal duty to disclose what percentage of the sales price went to purchase the Say No To Drugs material. Nor did the government advance any evidence at trial as to the legal basis for such a duty.

3) Jury Deliberations

On November 7, 1996, at 12:30 p.m. the jury began their deliberation. (Tr. V, 1180). At 4 p.m. they sent out a note stating "we, the jury, cannot come to an agreement on any counts of the indictment." (Tr. V, 1181) The jury returned to deliberations at 8:30 a.m. on November 8, 1996 (T 1182, L 21). The jury, after deliberating another 3 ½ or 4 hours, then sent a second note stating they still could not reach a verdict on any count for all defendants. (Tr. V, 1189-1190). Over defendants' objections the district court gave the jury the Allen charge at 11:50 a.m. (Tr. V, 1190). The jury returned to their deliberations and at 3:45 p.m. returned their verdicts finding Rochelle Whatley and Victor Whatley guilty of conspiracy to commit wire fraud, all Defendants not guilty of wire fraud and Rochelle Whatley guilty of 5 counts of money laundering (Tr. V, 1194).

4) The Sentencing Hearing

At sentencing, Ms. Whatley objected to several findings made in the Presentence Investigation Report (PIR), including a finding she had engaged in a scheme to defraud "vulnerable victims," that her company had represented itself

as a charity, and that in effect every sale made by the company involved a fraudulent transaction the dollar value of which could be included in determining the total "loss" for the purposes of setting Ms. Whatley's offense level. (Tr. V., 1202-05). As a result, the PIR recommended enhancing Ms. Whatley's sentencing level. Ms. Whatley argued that the PIR's recommendations were based in part on conduct that she had been acquitted of by the jury. Absent specific findings of fact that this conduct had been proven by a preponderance of the evidence, Ms. Whatley contended that it was inappropriate to enhance her sentencing level. The District Court overruled Ms. Whatley's argument and her objections to the PIR, but did so without making any specific findings of fact. (Tr. V, 1238). Ms. Whatley received a sentence of 63 months incarceration. (Tr. V, 1244-45).

ARGUMENT

I. Whether the District Court erred in determining Petitioner's sentence by considering Petitioner 's acquitted conduct in its calculation in a manner inconsistent with this Court's decision in Watts, in that the District Court failed to state on the record if the acquitted conduct considered had been established by the government at trial by a "preponderance of the evidence."

The district court trial judge committed reversible

error when it failed to make a sufficient record as to how the acquitted conduct, used in determining Ms. Whatley's sentence, had been proven by a preponderance of the evidence as required under United States v. Watts. An "acquittal sheds no light in whether a preponderance of the evidence established [one]'s participation." United States v. Watts, 117 S.Ct. 633,638 (1997). The Eighth Circuit Court of Appeals affirmance of the district court's decision is at odds with this Court's decision in Watts and violates petitioner's right to Due Process under the Fifth and Fourteenth Amendments.

At the sentencing hearing, Ms. Whatley presented objections filed in response to the recommendations of the presentence investigation report (PIR), including three main objections calling for sentence enhancement due to the applicability of vulnerable victim enhancement, the applicability of charitable organization enhancement, and the method of loss calculation. (Tr. V, 1202-05) Interwoven through out each of these objections is the issue of whether the use of acquitted conduct was properly considered by the district court in determining Ms. Whatley's sentence.

It is understood that under United States v. Watts, 117 S.Ct. 633, 637 (1997) a district court is free to consider acquitted conducting in sentencing as long as that conduct is shown to be proven by a preponderance of the evidence. *See also*, United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 498 U.S. 960 (1990) (cited in Watts, 117 S.Ct. at n. 1). However, the trial judge in this instance failed to follow Watts when he determined the Ms. Whatley's

sentence level range, even though the government specifically brought the ruling to his attention at the hearing. (Tr. V, 1236).

The trial judge stated the following after hearing evidence on the objections raised at the sentence hearing:

> And so it is the court's position on those three issues, with regard to vulnerability, that the defendant's objection will be overruled, or denied. With regard to the issue of -- let's see how it's exactly stated here. Well, with regard to the issue of charitable organization, while it is true that it was not an outright declaration that the company was a charitable organization, it certainly was reasonable to draw that inference from the statements that were made, so that will be denied as well. And with regard to the issue of calculation of loss, that will be denied or overruled as well.

(Tr. V, 1236). At no time did the judge state which evidence of conduct the government had sufficiently established by a preponderance of the evidence to justify an enhancement. Based on the PIR, which included acquitted conduct as relevant conduct, the court imposed a two (2) level enhancement because the "conspiracy intentionally contacted vulnerable individuals," a ten (10) level enhancement "because the loss associated with the offense during the operation of the scheme was in excess of $500,000," and a two (2) level enhancement for misrepresenting that "a

charitable organization" for the conspiracy count. (PIR, 15). Regarding the money laundering counts, the district court imposed a four (4) level enhancement because the funds laundered in this case totaled $715,000, which exceeded the $100,000 value threshold. (PIR, 16). PIR enhancements were based on the inclusion of the underlying conduct from Ms. Whatley's acquittal on all 105 counts of wire fraud as relevant conduct. Ms. Whatley does not dispute that relevant conduct is applicable to determining sentencing enhancement. Watts, 117 S.Ct. at 634 (discussion of U.S.S.G. § 1B1.4 and 18 U.S.C. § 3661). However, acquitted conduct cannot be considered relevant conduct unless sufficiently proven.

Under Watts, the Supreme Court reaffirmed its position that "'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'" 117 S.Ct. at 637 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The Court then commented that a "jury cannot be said to have 'reasonably rejected' any facts when it returns a general verdict of guilty. Id. If one follows the Court's logic, then it can also not be said that the jury "reasonably accepted" those facts either and acquitted only because the facts were not proven beyond a reasonable doubt. As the Supreme Court noted in the dissent of Watts sister case, United States v. Putera: "'[A]n acquittal is not a finding of any fact. . . Without specific jury findings, no one can logically or realistically draw any factual finding inferences. . .'" Id. (citing 78 F.3d 1386, 1394 (9th Cir. 1996)).

This dilemma can only be overcome when the court

reviews the evidence presented by the government pertaining to the acquitted conduct and makes specific findings on the record indicating which aspects were proven by a preponderance of the evidence. Watts, 117 S.Ct. at 634-635 (discussion of the fact the district court found defendants' conduct proven by preponderance of evidence); *see* United States v. Larson, 110 F.3d 620 626, n.5 (8th Cir. 1997) (determination of a conspiracy for sentencing purposes was upheld in part because district a specific finding of fact that the conspiracy had been proven by a preponderance of the evidence). Absent a specific factual finding by the court that the conduct-in-question was sufficiently proven, the use of such conduct would arguable violate a defendant's Due Process protections.

At trial, Ms. Whatley was acquitted of 105 specific counts of wire fraud. The government attempted to use the underlying conduct for these acquittals as relevant conduct for sentence level determination at the sentencing hearing. The judge's statement failed to adequately set forth specific findings stating which aspect of Ms. Whatley's conduct had been proven by a preponderance of the evidence. For instance, the PIR contained the names of 98 individuals it considered to be victims. These 98 individuals were identified by the government's witness at the sentencing hearing as being substantially the same individuals set forth in the 105 individual wire fraud counts. (Tr. V, 1233). The government introduced evidence at trial and at the sentencing hearing that Ms. Whatley intentionally targeted vulnerable victims because of the victims' ages. Said evidence was

refuted by Ms. Whatley which showed that there was insufficient evidence to establish that she intentionally targeted older individuals. (Tr. V, 1233-35) . The government also introduced evidence the aggregate loss for these individuals was $220,908 (PIR, 14) and that the total amount of money laundered was $715,000 (PIR, 15-16). At the hearing, Ms. Whatley objected to these figures since she was found by the jury to have laundered at most $88,000 (Tr. V, 1241). Ms. Whatley introduced evidence at trial and again it its post-trial motions objecting to the government's calculation of loss formula.

In United States v. Rutgard, 108 F.3d 1041, 1064 (9th Cir. 1997), the Ninth Circuit Court of Appeals addresses the question making specific factual findings for sentencing purposes. There, the Court of Appeals reviewed whether a defendant's enhancement for loss had been properly proven. "At sentencing, basing itself upon the evidence it heard during 79 days of time, the [trial] court found Rutgard's practice 'permeated with fraud.'" Id. The Ninth Circuit reversed stating that such an opinion is "too indefinite to sustain a criminal conviction absent specific supporting evidence." Id. Here, Ms. Whatley contends that the district court's statement on sentence enhancement were equally too indefinite and absent specific factual findings to support imposing.

Counsel for Ms. Whatley even urged the judge for the need to avoid making blanket conclusions for every transaction made by Ms. Whatley and to instead make a particularized finding for each transaction. (Tr. V, 1204). The fact the judge failed to state specific findings for the

acquitted conduct is even more disturbing because the government's main witness, Special Agent Mickey Roberts stated that evidence about many of the 98 people discussed above was never introduced at trial. (Tr. V, 1236). Such a statement raises the question of how the district could have found a preponderance of the evidence had it applied the standard. No evidence was presented either at trial or at the sentencing hearing regarding the alleged defrauded customers. The court simply assumed, without evidence, that all of the company's transactions were fraudulent. The Eighth Circuit's affirmance of the district court's decision is inconsistent with precedent set under Watts and in conflict with Rutgard.

For the reasons stated, petitioner urges the Supreme Court to grant petition for review in order to reverse the sentence imposed or in the alternative to remand for a new sentencing hearing to be conducted on the record with specific findings by a preponderance of the evidence stated.

II. Whether the District Court erred in issuing an Allen charge, after the jury had twice deadlocked, which substantially varied from the language the Eighth Circuit approved in Thomas, and was therefore coercive under this Court's decision in Allen and its prodigy, because the charge given failed to expressly restate the government's burden of proof, failed to ask both the majority and minority to review their positions, and failed to expressly recognize the possibility that the majority may be in favor of acquittal.

The district court committed reversible error when it

gave an Allen charge instruction that substantially departed from the model instruction approved by the Eight Circuit in United States v. Thomas, 946 F.2d 73 (8th Cir.1991). The defective instruction failed to sufficiently state all the required elements outlined in Potter v. United States, 691 F.2d 1275 (8th Cir. 1982), thereby creating an impermissible coercive effect on the jury's deliberation. The Eighth Circuit's affirmance of this instruction was inconsistent with the Circuit's prior decisions and therefore inconsistent with Allen v. United States, 164 U.S. 492, 501-502 (1896) and its prodigy.

A long held tenet of our jurisprudence is the belief that a criminal defendant "tried by a jury is entitled to the uncoerced verdict of that body." Lowenfield v. Phelps, 484 U.S. 231, 241 (1988). The danger for coercion is especially acute when an Allen charge is given because of the "potential coercive effect upon jurors. . . who hold a minority position at the time the instruction is given." Potter, 691 F.2d at 1278 (quoting, United States v. Cook, 663 F.2d 808, 810 (8th Cir. 1981); United States v. Smith, 635 F.2d 716, 721 (8th Cir. 1980). "The primary reason for judicial disfavor of an Allen charge ... is its potentially coercive effect upon those members of a jury holding to a minority position at the time of the instruction." United States v. Beattie, 613 F.2d 762, 764 (9th Cir.), cert. denied, 446 U.S. 982 (1980)).

To deal with this problem, federal courts have approved specific instruction language "designed to ameliorate [the Allen charge's] coercive effect." United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971)). The

Eighth Circuit, at various times, has expressly approved language for an Allen charge consistent with the rulings of the Supreme Court. The most recent statement by the Eighth Circuit came in United States v. Thomas, 946 F.2d 73, 76 (8th Cir. 1991) where the court approved the use of Instruction 10.02 of the Eighth Circuit Manual of Model Jury Instructions.[1]

In the case at bar, the jury began deliberating at 12:30 P.M. on November 7, 1996, after the conclusion of a six and one-half (6 ½) day trial. Four (4) hours into their deliberations, the jury sent a note to the district court judge stating they could not reach an agreement on any count of the indictment. (Tr. V, 1181). The trial judge, over the defendants' objection, sent back a note to the jury asking if a recess for the evening would benefit the jurors' deliberation. (Tr. V, 1181). The jury replied affirmatively and deliberations were recessed until the following morning. Deliberations resumed the next morning at approximately 8:30 A.M. After deliberating for approximately two (2) hours and fifteen (15) minutes (total deliberation time six hours, fifteen minutes), the jury sent a second note stating they were still unable to come to any verdict. (Tr. V, 1190). At this point, the trial judge decided to issue an Allen charge. The trial judge stated specifically that he would use the model Eighth Circuit Allen charge set forth in Instruction 10.02 of the Eighth Circuit Manual of Model Jury Instructions (West

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[1] Instruction 10.02 is set forth at Appendix B - 31.

1996). (Tr. V, 1190). Ms. Whatley objected to the issuance of the proposed Allen charge and moved for a mistrial, which was denied. (Tr. V, 1190-91). Although the district court stated its intention to issue the model Allen charge, Instruction 10.02, the trial judge instead issued a defective variation.[2] (Tr. V, 1191-93). The district court's variation failed to include the following portion of the model Eighth Circuit Allen charge language:

> Remember that if in your individual judgment the evidence fails to establish guilt beyond a reasonable doubt, then the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty. Of course the opposite also applies. If in your individual judgment the evidence establishes guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty and if all of you reach that conclusion then the verdict of the jury must be guilty. As I instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt every essential element of the crime[s] charged.

Eighth Circuit Manual of Model Jury Instructions, p. 473. (West 1996). Petitioner contends that the defective instruction had an impermissible coercive effect on the jury's

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[2] The Instruction (No. 34) issued by the trial judge is set forth at Appendix B - 29.

deliberation.

The value of the approved model Allen charge is that it formulates those five (5) elements deemed essential to preventing a coercive effect:

> [The instruction should] expressly recognize [ ] the possibility that a majority of the jurors may have favored acquittal, that the government has the burden of proof beyond a reasonable doubt, that the majority as well as the minority should reexamine their positions, that no juror was to yield a conscientiously held conviction, and that the jurors could continue to deliberate as long as they required.

Potter, 691 F.2d at 1275 (quoting, Smith, 635 F.2d at 721); Thomas, 946 F.2d at 76 ("Language 'covers the essential points of the traditional Allen charge. . . .'" (cites omitted)). The Eighth Circuit had even warned district courts against making "substantial departures" from charges which have "received judicial approval." Potter, 691 F.2d at 1277 (quoting Flannery, 451 F.2d at 883). The district court's Allen charge issued failed to ask the majority and the minority to reexamine their positions, and failed to restate the government's burden to prove its case beyond a reasonable doubt. Because the district court departed from Instruction 10.02, the Allen charge given had an impermissible coercive effect.

It is understood that four (4) considerations bear on evaluating coercive effect -- content of the charge, length of deliberation after the charge is given, total jury deliberation

length, and further indicia on the record of coercion. United States v. Cortez, 935 F.2d 135 (8th Cir. 1991).

1) Content Of The Charge.

As stated, the Eighth Circuit has produced binding authority on what constitutes an appropriate Allen charge. Potter, supra; Thomas, supra. The charge given here is factually similar to the defective instruction reversed in Potter. In Potter, the instruction issued failed to state the government's burden of proof and did not ask the majority and the minority should review their positions. 691 F.2d at 1280. The one factual difference between Potter and Ms. Whatley's situation is that the Potter instruction had asked the minority to review its position. Id. at 1279. Here, the Allen charge given completely omitted the requirement to ask both the majority or the minority to review their positions. Both instructions also failed to restate the government's burden of proof. The district court's instruction here is more defective than the Potter instruction because it failed "to give express recognition to the possibility that the majority may be for acquittal," which that court stated as another consideration to review. Id. at 1281, n.6. As a result, the charge given in Ms. Whatley's case is sufficiently defective to be construed as "so coercive that the judgment must be reversed." Id. at 1280.

Furthermore, "the mere fact that the charge contained some proper language does not cure its defects." United States v. Robinson, 953 F.2d 433, 437 (8th Cir. 1992). Nor can it be said that the missing language is simply a reiteration of the government's burden of proof. Nor can one argue that the fact that the government's burden of proof appears in the

other instructions given lessen the Allen charge's coercive effect. In Robinson, a defective Allen charge was issued after jury deliberations had begun. There, the government contended that if the defective Allen charge was viewed together with the instructions issued before the deliberations started, that the jury could "disregard any coercive implications of the supplemental charge." 953 F.2d at 438. This argument has also been made in Ms. Whatley's case regarding the failure to restate the government's burden of proof. However, the position is inconsistent with this Court's statement in Robinson:

> The supplemental charge, given extemporaneously by the Court and without any reference to the earlier instruction, would, we think, have a much greater psychological impact than a single instruction given routinely as part of the whole body of instructions delivered before deliberations began. The supplemental charge would naturally be prominent in the jurors' consciousness when they returned to the jury room.

953 F.2d at 438. Although, the jury may have been reminded several times in different instructions of the government's burden of proof, this does not out weigh the coercive effect of its omission from the Allen charge. Because the Allen charge did not include all five elements, and substantially departed from judicially approved instructions, the charge was coercive.

2) Jury Deliberation Time, After The Charge Was Given, And In Total.

After the district court gave the erroneous Allen charge, the jury returned to its deliberations. The jury retired at 11:50 AM. (Tr V, 1193). At 1:23 PM the district judge sent a note to the jury inquiring about two things. First, the district court asked the jury if they were "still unable to reach a unanimous verdict as to any count?" (Tr. 1193). Second, the district judge asked if the jury "believe further deliberations would result in you being able to reach unanimous verdicts as to any count?" At 2:00 PM the jury answered "no" to the first question and "yes" to the second. (Tr. 1194). Therefore, after some two hours of post Allen charge deliberation, the jury had already begun to reach verdicts on some of the counts of the indictment. The record does not show how long the jury deliberated after being read the erroneous Allen charge prior to reaching a verdict on one or more counts of the indictment. The record shows only that the jury reported that they had reached verdicts on one or more counts by 2:00 PM. The jury may very well have reached a verdict on one or more counts long before 2:00 PM. The record neither confirms nor fails to confirm that the jury quickly reached a verdict or verdicts by 2:00 PM, about two (2) hours after the reading of the erroneous Allen charge.

Although the length of time of deliberation is not dispositive of a coercive effect; if the deliberation times impacted the jury at all, it was in a coercive and pressuring way. *See*, Robinson, supra, at 437. This was not a simple case with only a few counts, but rather a complex case which

included 51 counts for the jury to consider. Prior to the Allen charge, the jury was unable to reach a verdict on any one of the 51 counts, in almost seven hours of deliberations. Yet, two hours after the Allen charge the jury felt confident they could and may have already reached unanimous verdicts on all 51 counts. Thus, while the amount of time the jury spent deliberating may not be conclusive of a coercive effect, it is clearly not dispositive that there was a lack of coerciveness as has been contended.

3) Further Indicia On The Record Of Coercion.

The clearest example of the Allen charge's coercive effect lies within the record itself, specifically in the verdicts rendered by the jury. They are:

1. The coercion is evident in the jury's decision to acquit petitioner of all substantive counts of wire fraud, yet convict her of five counts of money laundering when those counts were specifically predicated on the successful establishment and conviction of at least one substantive count of wire fraud.

2. The decision to convict petitioner Rochelle K. Whatley of the conspiracy to commit wire fraud, yet acquit her of the actual offense of wire fraud illustrates the charge's coerciveness by rendering an inconsistent verdict. The MMC's business goals, which the government contended constituted wire fraud, were carried out fully. Yet, the jury acquitted her of these counts. Since, Ms.

Whatley's business actions did not constitute wire fraud, her business planning and organizing cannot constitute a conspiracy to commit wire fraud.

3. The fact verdicts began being reached only 2 hour after the charge was read.

4. The fact that the jury was able to reach verdicts on all counts, when prior to the Allen charge they were unable to reach verdicts on any count.

5. Petitioner Rochelle K. Whatley's convictions for money laundering are inconsistent with her acquittal on a sixth money laundering count which was used to pay taxes on MMC proceeds.

The fact the jury acquitted Ms. Whatley of some charges is insufficient "to indicate a lack of coercion with respect to the other counts...." Robinson, 953 F.2d at 437. Therefore, petitioner urges the Supreme Court to grant petition for review, based on the reasons stated above, in order reverse the district court's decision or in the alternative to remand for a new trial.

III. Whether the District Court erred in not setting aside Petitioner's conviction for money laundering under 18 U.S.C. § 1957, which requires the establishment of some "specified unlawful activity" as an essential element of the offense, which the government failed to establish when the jury acquitted petitioner of all counts of wire fraud.

The district court committed reversible error when it did not set aside Ms. Whatley's money laundering convictions, since no underlying conduct existed to predicate the 18 U.S.C. § 1957 offense. The Eighth Circuit's affirmance of the district court's decision is inconsistent with statutory meaning and intent of 18 U.S.C. § 1957.

The government failed at trial to prove beyond a reasonable doubt the predicated "specified unlawful conduct" needed to establish the alleged money laundering offenses under 18 U.S.C. § 1957. As a result,

The Government based Counts 108 through 112 of the indictment on alleged violations of 18 U.S.C. § 1957.[3] The Eighth Circuit holds that "money laundering statute prohibits anyone from knowingly engaging 'in a monetary transaction in criminally deprived property that is of a value greater than $10,000 and is derived from specified unlawful activity.' 18 U.S.C § 1957(a). Section 1957(f)(3) provides that the 'specified unlawful activity' is defined in 18 U.S.C. § 1956. Section 1956(c)(7) in turn defines 'specified unlawful activity' in five different ways in subsection (A) through (E).'" United States v. Hare, 49 F.3d 447, 451-452 (8th Cir. 1995) (quoting, 18 U.S.C. § 1956-1957).

A primary element of the offense is that the money involved must be "derived from specified unlawful activity."

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[3] Ms. Whatley notes that the jury acquitted her of a sixth (6) money laundering count, Count 113, which was identical to the other money laundering counts except for the dates allegedly committed and that was an adjustment in her salary as per the CPA's instruction.

As a result, the activity underlying the offense must be both envisioned with in the scope of § 1956(c)(7) and must be committed first in order to predicate the money laundering offense. *See* United States v. O'Hagan, 92 F.3d 612, 628 (8th Cir. 1996), Hare, 49 F.3d at 451-452, United States v Kennedy, 64 F.3d 1465 (10th Cir. 1995); *see also* U.S. v. LaBrunerie, 914 F.Supp. 340, 345 (W.D. Mo. 1995). Otherwise, there is no basis for the offense.

In the case at bar, the government's Indictment predicated the money laundering counts against Ms. Whatley, set forth in Counts 108-112, upon the specified unlawful activity of wire fraud under 18 U.S.C. § 1343. (Indictment, Counts 2-107). Ms. Whatley recognizes such activity is well with in the scope of § 1957. "Subsection (A) defines 'specified unlawful activity" as 'any act or activity constituting an offense in section 1961(1) of this title. . . Wire fraud is specifically listed in section 1961(1)(B) . . . therefore, wire fraud is a 'specified unlawful activity' within the meaning of the money laundering statute, 18 U.S.C. § 1957(a)." Hare, F.3d at 452. However, the government needed to prove beyond a reasonable doubt the individual counts of wire fraud in order to sufficiently establish the "specified unlawful activity" element of the alleged money laundering offenses. This was evidenced in the instructions given. Instruction No. 29 set for the money laundering offense and contained five essential elements of proof.[4] The government had the burden to prove each of these elements

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[4]Instruction No. 29 is set forth at Appendix B - 28.

beyond a reasonable doubt in order for a charge of money laundering to exist. The second element required proving beyond a reasonable doubt that "the withdrawal was of property of a value greater than $10,000 derived from wire fraud as defined in Instruction No. 25." (Instruction No. 29). Instruction No. 25 set forth the essential elements of proof needed for a wire fraud conviction.[5] If Ms. Whatley was found guilty of wire under Instruction No. 25 then the predicate conduct needed for Instruction No. 29 would exist. However, Ms. Whatley was acquitted on every substantive wire fraud count. Under Watts, supra, the jury's acquittal means the government failed to prove wire fraud beyond a reasonable doubt. Thus as a consequence, the government also failed to "prove all of [the] essential elements beyond a reasonable doubt" necessary to find Ms. Whatley guilty of money laundering as set forth in Instruction No. 29. (Instruction No. 29).

The Eight Circuit has held that when money laundering offenses are predicated on underlying conduct that is not sufficiently proven "there no longer remains any conviction to serve as the predicate conduct upon which to base the money laundering counts. O'Hagan, 92 F.3d at 628. In O'Hagan, a defendant was initially charged with and convicted of securities fraud. Id. at 627-628. The conviction served as the specified unlawful activity under § 1957(a) to base a money laundering charge and conviction. On review, this Court vacated the securities fraud conviction, which was

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[5]Instruction No. 25 is set forth at Appendix B - 25.

the underlying conduct for the § 1957 conviction. Id. at 627. As a result, the basis for the § 1957 conviction also collapsed. In Ms. Whatley's situation, there was never even an initial conviction of wire fraud to establish sufficient grounds for the money laundering offense. (Tr. V, 1194-95). Thus, the district court erred in not setting aside the money laundering conviction.

In United States v. Finn, 919 F.Supp. 1305, 1352 (D.Minn. 1995), the district court held that if the counts of an indictment which constitute the "specified unlawful activity" for purposes of the money laundering counts are abandoned, so too must the money laundering counts under § 1957(a). Although Finn commented that the government need not show the defendant "committed the predicate crimes," the government must establish some basis for the "specified unlawful activity." Id. At n. 58. Said basis will collapse if the counts of an indictment which constitute the "specified unlawful activity" for purposes of the money laundering counts are dismissed. Id. The result must be the same if the defendants were all acquitted on charges of wire fraud which constitute the "specified unlawful activity" for the purposes of the money laundering charges. If the government fails to prove beyond a reasonable doubt that wire fraud actually occurred, then the basic requirement of an underlying offense has not been met.

Likewise, LaBrunerie held that "it is clear that the underlying offense must be completed before a transaction can be charged as money laundering." 914 F. Supp at 341. In reaching its decision, LaBrunerie relied on United States v.

Kennedy, which held that committing money laundering requires "a transaction meeting the statutory criteria that takes place after the underlying crime has been completed." 64 F.3d at 1477. It would be inconsistent as a matter of law to hold that jury could in one instance find wire fraud to not exist beyond a reasonable doubt and in another instance hold that same wire fraud now existed.

CONCLUSION

For the reasons states, petitioner urges the Supreme Court to grant petition for review in order to reverse the convictions imposed, or in the alternative remand for a new trial.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER DENYING REHEARING
FILED, FEBRUARY 19, 1998
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OPINION
FILED, JANUARY 7, 1998
PAGE 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1661/1663WMKC

United States of America	*	
Appellee,	*	
vs.	*	Order Denying Petition for
	*	Rehearing and Suggestion
Rochelle K. Whatley;	*	for Rehearing En Banc
J. Victor Whatley.	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 19, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1661

United States of America, Appellee,	*	
v.	*	Appeals from the United States District Court for the District of Missouri.
Rochelle K. Whatley, Appellant.	*	

No. 97-1663

United States of America, Appellee,	*	
v.	*	
J. Victor Whatley, Appellant.	*	

No. 97-1789

United States of America, *
Appellee, *
*
v. *
*
Michael Todd Landess, *
Appellant. *

No. 97-1790

United States of America, *
Appellee, *
*
v. *
*
Harold B. Barnett, Jr., *
Appellant. *

Submitted: September 8, 1997
Filed: January 7, 1998

Before HANSEN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Rochelle Whatley and her husband, Victor Whatley, were the principals in a telemarketing firm called Midwest Marketing Concepts (MMC). Mrs. Whatley was president and sole shareholder, while Mr. Whatley served variously as a consultant and a general manager. MMC employed the two other appellants in this case, Michael Landess and Harold Barnett, as telemarketing salesmen.

We state the facts as the evidence would support a reasonable jury in finding. Working from phone lists obtained from other telemarketing firms, an MMC salesman would call an individual and say that he or she had been selected for MMC's "V.I.P. Bonus Round," and was guaranteed to win one prize from a list that typically included a new Saturn automobile, a pair of Lucien Picard watches, a $10,000 savings bond, and a pound of gold, along with other, much less valuable items ("gimme gifts"). All that MMC asked in

exchange was that the individual purchase "Say No To Drugs" materials and donate them to a local church or school.

If a customer expressed interest, he or she was sold a "starter box" of the "Say No to Drugs" materials, which ranged in price from $400 to $800. The materials were in fact shipped to the specified organization, but the total cost to MMC of those materials was only about $40. The MMC sales representative pushed each customer into having the materials delivered directly to the designated organization, so that the customer would not be disappointed with the amount of materials that his or her money had purchased.

Customers were chosen for their susceptibility to this scheme. Sales representatives focused their sales efforts on people whom they perceived to be old or particularly lonely. They used a variety of tactics to get individuals to send money to MMC. Although it was nowhere in MMC's internal phone scripts, some of the people called were promised that they would win a specific big prize and were given false statements as to the value of the "gimme gift." When a customer asked what the odds were of receiving the car or other prizes, sales representatives were told to change the subject and to repeat the promise that the customer was certain to win one of the four major prizes.

Individuals who purchased the materials would invariably receive only the cheapest gift on the list. Their names,

however, would be put back in MMC's file to be "reloaded," and they would be called again and told that they had a chance to win one of the larger prizes if they bought additional "Say No to Drugs" materials. If a customer tried his or her luck again, he or she would again receive a "gimme gift." No one, whether a one-time donor or one who was "reloaded," ever received an award other than a "gimme gift."

The Whatleys were indicted on one count of conspiracy to commit wire fraud and 106 counts of wire fraud, in violation, respectively, of 18 U.S.C. § 371 and 18 U.S.C. § 1343. In addition, Mrs. Whatley was indicted on six counts of money laundering, in violation of 18 U.S.C. § 1957(a), § 1957(d)(1). A jury convicted the Whatleys of conspiracy but acquitted them on all 106 counts of wire fraud; the jury convicted Mrs. Whatley on five of the six money-laundering counts against her. Mrs. Whatley was sentenced to 60 months in prison on the conspiracy charge and 63 months in prison on the money-laundering counts; Mr. Whatley received a 60-month prison sentence on the conspiracy charge. Mr. Landess and Mr. Barnett each pleaded guilty to one count of conspiracy to commit wire fraud and one count of wire fraud and were sentenced, respectively, to 30 months and 24 months in prison.

The Whatleys appeal their convictions and their sentences. Mr. Landess and Mr. Barnett appeal their sentences. We affirm the judgments of the district court.[1]

I.

After closing arguments in this case, the jurors began deliberating at 12:30 p.m.; at 4:00 p.m., they informed the district judge that they were unable to reach a verdict. The jurors then retired for the evening and resumed their deliberations the following morning. After two and a half more hours of deliberating, they were still unable to reach a verdict. The court, on its own motion, and over the objection of the defense, then gave the jury an *Allen* charge, *see Allen v. United States*, 164 U.S. 492, 501-02 (1896), to encourage it to continue deliberating and, after four more hours, it reached verdicts on all counts.

The Whatleys assert that the district court erred because it did not give the complete *Allen* charge contained in Eighth Circuit Model Criminal Jury Instruction 10.02. It is true that the district court failed to read any part of the third paragraph of this instruction, which reiterates the burden of proof; the instruction was otherwise correct and complete, however, directing jurors to deliberate with a view to reaching a verdict, so long as one could be reached without violating any juror's

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[1]The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri.

convictions about the ultimate truth of the matter before them.

We examine the correctness of jury instructions as a whole and not atomistically, *see United States v. Park*, 421 U.S. 658, 674-75 (1975), and we will not reverse a conviction based on an alleged error in instructing the jury unless that error was prejudicial. In the case of an *Allen* charge, we look to the text of the instruction, the time that the jury deliberated before and after receiving the charge, and the context in which the charge was given, to determine whether the jury was coerced into reaching a guilty verdict. *United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980).

We see no evidence of coercion here. Indeed, the fact that the jury deliberated for four hours after the district court gave the *Allen* charge suggests to us that the jurors carefully considered the case. We have held that a verdict returned only forty-five minutes after an *Allen* charge was not coerced. *See Smith*, 635 F.2d at 720-21; *see also United States v. Cook*, 663 F.2d 808, 810-11 (8th Cir. 1981) (*per curiam*) (verdict not coerced when returned at least one hour after charge given).

The Whatleys argue that the verdicts themselves prove coercion because the jury, which had not reached any verdicts at the end of the first day of deliberation, ultimately came to verdicts on all counts after receiving the *Allen* instruction. We find no merit in this argument. The jurors had a total of

113 counts in front of them against four defendants (the Whatleys and two defendants not part of this appeal). They acquitted two defendants and reached a mixed verdict for both Mr. and Mrs. Whatley. Unless we assume that ten hours is not enough time to reach verdicts on that number of counts, which we will not do, there is nothing in this record tending to show that this *Allen* charge coerced the jury into reaching its verdict.

II.

The Whatleys maintain that because the jury acquitted all of the defendants on the underlying wire fraud counts, there was no scheme to defraud and thus no conspiracy. There are a number of infirmities in this argument, but it is sufficient for present purposes to note that conspiracy is a crime in itself and is punishable whether it succeeds or fails. *See Pereira v. United States*, 347 U.S. 1, 11 (1954). Even if the acquittals to which the Whatleys point are inconsistent with their convictions on the conspiracy charge, there are numerous cases that indicate that a conviction must stand if there is sufficient evidence in the record to sustain it. *See United States v. Pemberton*, 121 F.3d 1157, 1168-69 (8th Cir. 1997). This record is replete with such evidence, as we have already indicated, so there is no error here.

The Whatleys also complain that the jury instructions dealing with the conspiracy charge misstate the law in several important respects. The Whatleys lodged no objections to

these instructions in the district court, however, and we therefore review them only for plain error. *See* Fed. R. Crim. P. 30; *see also United States v. Beasley*, 102 F.3d 1440, 1452 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1856 (1997). Having examined the instructions, we are of the view that they were carefully crafted and tailored to the case. There is certainly nothing plainly erroneous about them, nor can we say that it is likely that any error in them affected the outcome of the case adversely to the Whatleys. *See United States v. Olano*, 507 U.S. 725, 734-35 (1993).

Mrs. Whatley contends that she cannot be convicted of money laundering in violation of 18 U.S.C. § 1957(a), § 1957(d)(1), since she was not convicted of the offense by which she allegedly obtained the money. But the fact that the jury did not convict her on the relevant underlying wire fraud charges does not undermine the money-laundering convictions here. Mrs. Whatley relies principally on *United States v. O'Hagan*, 92 F.3d 612, 628 (8th Cir. 1996), *rev'd on other grounds*, 117 S. Ct. 2199 (1997), for the proposition that a money-laundering conviction cannot stand without a conviction on an underlying offense. But we ruled in that case that as a matter of law the acts that the defendant committed were not illegal and therefore that there was no predicate offense for the money-laundering charge. *Id.* at 613-14, 622, 628. In the present case, by contrast, there is no doubt that the district court properly submitted the wire fraud

charges to the jury, because there was sufficient evidence presented at trial that violations of the law had occurred.

The only relevant question when reconciling inconsistent verdicts, as we have already said, is whether there was enough evidence presented to support the conviction. *Nesbitt v. Hopkins*, 86 F.3d 118, 121 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 528 (1996). Inconsistent verdicts are not, on their own, sufficient grounds for reversal or a new trial. A jury may acquit a defendant as to one or more charges for any number of reasons, including an inclination to be merciful, and yet come to the reasonable conclusion that the defendant was guilty of other related charges. *See United States v. Powell*, 469 U.S. 57, 64-65 (1984).

III.

With respect to their sentences, all of the defendants suggest that the Supreme Court's recent decision in *United States v. Watts*, 117 S. Ct. 633 (1997) (*per curiam*), obligates district courts to make specific findings detailing precisely how acquitted conduct used for sentencing purposes has been proved by a preponderance of the evidence. We disagree. *Watts* holds only that a sentencing court may consider the conduct underlying an acquitted charge "so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 638. The case contains no requirement even that a district court state on the record that its sentencing findings are supported by a preponderance of the evidence, much less

that such a court provide a detailed account of all of the facts that underlie these findings. We believe that it is enough if a district court simply makes the factual findings necessary to support the relevant sentencing adjustments.

A district court's factual findings for sentencing must, of course, be supported by evidence sufficient to convince a reasonable fact finder that that evidence preponderates in favor of those findings. We review those findings for clear error and reverse only if we are left with the definite and firm conviction that the district court erred. *United States v. Garrido*, 995 F.2d 808, 812 (8th Cir. 1993), *cert. denied*, 510 U.S. 926 (1993). Here, the district court made such findings on the amount of loss, on whether the defendants misrepresented their operation as a charity, and on whether the victims were unusually vulnerable.

All of the defendants challenge the calculation of the loss occasioned by their fraud, a figure that determines an enhancement to their respective base offense levels under the federal sentencing guidelines. *See* U.S.S.G. § 2F1.1(b)(1). The court's method for calculating the loss must, of course, be a reasonable one, but the loss "need not be determined with precision." *United States v. Berndt*, 86 F.3d 803, 811 (8th Cir. 1996). In this case, the district court calculated the loss by determining MMC's gross revenues, minus the money lost to MMC from refunds and checks on which payment was

stopped, the money that MMC spent on prizes, and the money that MMC spent on the "Say No to Drugs" products.

The defendants suggest first that the amount of loss should be reduced by allowances for a reasonable profit and the overhead of running their business, that is, the costs of salaries for employees, of handling of the prizes and the "Say No to Drugs" products, and of shipping those prizes and products. But the district court found that the defendants' business was a conspiracy to commit wire fraud, and we are not inclined to allow the defendants a profit for defrauding people or a credit for money spent perpetuating a fraud.

Mr. Landess and Mr. Barnett suggest that the amount of loss used to fix their sentences should reflect only their own conduct. We held in *United States v. Earles*, 955 F.2d 1175, 1180 (8th Cir. 1992), however, that the amount of loss charged to a particular defendant need not be limited to the money that he or she personally handled. Instead, the amount of loss may include those losses caused by reasonably foreseeable acts that co-workers committed to further the scheme to defraud. *Id.*; *see also United States v. Sandow*, 78 F.3d 388, 392-93 (8th Cir. 1996). There was sufficient evidence in this case for the district court to conclude that co-workers' actions that caused losses were reasonably foreseeable to Mr. Landess and Mr. Barnett and were part of the same conspiracy to commit wire fraud in which they engaged.

Mr. Landess, who worked for the organization for only the first four of the ten months that it operated, challenges the amount of loss that the district court employed to fix his sentence. The district court determined the amount of loss for which Mr. Landess was responsible by taking the total amount of loss caused by the operation, dividing it by the ten months of MMC's operation, and multiplying the result by four. Mr. Landess suggests that this method is unfair, since, he says, the operation probably generated less revenue during its earlier stages. We believe, however, that the district court's method of calculating the loss attributable to him was reasonable. As we have already said, the loss need not be determined with precision. Furthermore, Mr. Landess's actions at the beginning of the operation may have created benefits reaped long after his departure. The district court was in the best position to evaluate these competing concerns, and we will not reject its factual findings unless we think that they are clearly erroneous, which we do not.

Mr. and Mrs. Whatley challenge the district court's findings that the defendants represented falsely that they were acting on behalf of a charity and that they defrauded unusually vulnerable victims. We believe that there was sufficient evidence for the district court to conclude that Mr. and Mrs. Whatley's organization misrepresented that it was acting on behalf of a charity. The telemarketing script indicates that the "Say No to Drugs" products bought by victims of the Whatleys' scheme were going to schools and churches. The

script also uses the term "donation" to describe the transfer of funds from the victims to the Whatleys' operation. An enhancement of their sentence for misrepresenting that they were acting on behalf of a charity, in accordance with U.S.S.G. § 2F1.1(b)(3)(A), was therefore proper.

Nor do we see any reason to reverse the district court's imposition of a sentencing enhancement on the basis that the victims in this case were unusually vulnerable. *See* U.S.S.G. § 3A1.1(b). This sentencing enhancement applies when a defendant chooses to target a particular victim or group of victims on the basis of age or of physical or mental condition. *See United States v. Callaway*, 943 F.2d 29, 31 (8th Cir. 1991). A reasonable person could conclude on the basis of the evidence presented at trial and at the sentencing hearing that the defendants targeted the elderly and those who were known to be susceptible to the sort of operation that the Whatleys ran. Indeed, one piece of evidence introduced at sentencing indicates that MMC purchased so-called "response leads" that listed customers who would "buy from anyone and everyone that has sales ability," and there was also evidence that Mr. Whatley described these customers as "dupes." We believe, therefore, that this record provided a sufficient basis for the district court's application of the vulnerable-victim enhancement. *See United States v. Jackson*, 95 F.3d 500, 506-08 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 404, 532, 717 (1996).

Finally, Mrs. Whatley appeals the district court's finding as to the total amount of money that she laundered. We conclude, however, that we need not review this finding, as the amount of money laundered does not affect Mrs. Whatley's sentence. The offense level calculated in accordance with the sentencing guidelines for Mrs. Whatley's conspiracy conviction was greater than the offense level calculated for her money-laundering conviction. Under the sentencing guidelines provision for grouping related counts, the higher offense level applies to calculate the sentence for both convictions. *See* U.S.S.G. § 3D1.2(d). Thus, even if we were to find that Mrs. Whatley laundered less money than the district court concluded, Mrs. Whatley's sentencing range would not be affected, and since her sentence was at the very bottom of that range, we conclude that the amount of money that Mrs. Whatley laundered did not affect her sentence in any way.

IV.

We have considered the other assignments of error advanced by the defendants and find no merit in them. We therefore affirm the judgments of the district court in all respects.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the affirmance of the conviction and sentences under appeal and concur in the court's opinion.

I write separately only to underscore that nothing the court says today should be read by district judges as an unqualified approval of the Allen charge given in this case which made no reference to the burden of proof. This was one of the factors that led to a reversal in Potter v. United States, 691 F.2d 1275, 1278 (8th Cir. 1982), although the instruction in Potter had at least three other substantive variations from the Allen charges that have been approved by courts of appeals. As the court recognizes, a general objection to the Allen charge was made, but after the instruction was read omitting the third paragraph, appellants concede that further specific objection was not made. Thus, with respect to the contents of the instruction and the omission of the language concerning burden of proof, the court's review today is only for plain error. The burden of proof was referred to nine times in the instructions given to the jury at the conclusion of the evidence.

The central issue argued by appellant is the coercive effect of the instruction and, as the court holds today, under the record before us there was no coercion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

VERDICT FORM A
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10.02 DUTY TO DELIBERATE ("ALLEN" CHARGE)
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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES	)
OF AMERICA,	)
Plaintiff,	) No. 95-00199-01-CR-W-3
v.	)
	)
ROCHELLE K.	)
WHATLEY,	)
Defendant.	)

VERDICT FORM A

COUNT ONE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of the crime of conspiracy to commit wire fraud between in or about May, 1993, and in or about March, 1994, as charged in Count I of the indictment.

COUNT TWENTY-FOUR

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Eleanor Trost on or about December 28, 1993, as charged in Count 24 of the indictment.

COUNT THIRTY-ONE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Kent Browner on or about September 1, 1993, as charged in Count 31 of the indictment.

COUNT THIRTY-TWO

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Kent Browner on or about October 4, 1993, as charged in Count 32 of the indictment.

COUNT THIRTY-THREE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T.
Hutto and Kent Browner on or about November 2, 1993, as charged in Count 33 of the indictment.

COUNT THIRTY-FOUR

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Kent Browner on or about

November 29, 1993, as charged in Count 34 of the indictment.

COUNT FORTY-SEVEN

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Esther and Henderson Graham on or about August 4, 1993, as charged in Count 47 of the indictment.

COUNT FORTY-EIGHT

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Barney Craig on or about January 25, 1994, as charged in Count 48 of the indictment.

COUNT FORTY-NINE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between Sean T. Hutto and Barney Craig an or about February 22, 1994, as charged in Count 49 of the indictment.

COUNT FIFTY

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Barney Craig on or about October 16, 1993, as charged in count 50 of the indictment.

COUNT SEVENTY-0NE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Lela Hohl on or about September 9, 1993, as charged in Count 71 of the indictment.

COUNT SEVENTY-TWO

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Lela Hohl on or about October 12, 1993, as charged in Count 72 of the indictment.

COUNT SEVENTY-FIVE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call

between John Dillinger and Carl Raber on or about November 9, 1993, as charged in count 75 of the indictment.

COUNT SEVENTY-SIX

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Carl Raber on or about December 14, 1993, as charged in count 76 of the indictment.

COUNT SEVENTY-SEVEN

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of aiding and abetting the crime of wire fraud involving an interstate telephone call between John Dillinger and Allen Weeks on or about November 9, 1993, as charged in Count 77 of the indictment.

COUNT ONE HUNDRED AND EIGHT

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of money laundering involving the withdrawal of $12,000 from checking account No. 427768039 at Commerce Bank of St. Joseph on or about July 1, 1993, as charged in Count 108 of the indictment.

COUNT ONE HUNDRED AND NINE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of money laundering

involving the withdrawal of $15,000 from checking account No. 427768039 at Commerce Bank of St. Joseph on or about August 5, 1993, as charged in Count 109 of the indictment.

COUNT ONE HUNDRED AND TEN

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of money laundering involving the of $22,000 from checking account No. 427768039 at Commerce Bank of St. Joseph on or about September 3, 1993, as charged in Count 110 of the indictment.

COUNT ONE HUNDRED AND ELEVEN

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of money laundering involving the withdrawal of 25,000 from checking account No. 427768039 a Commerce Bank of St. Joseph on or about October 1, 1993, as charged in Count 111 of the indictment.

COUNT ONE HUNDRED AND TWELVE

We, the jury, find the defendant ROCHELLE K. WHATLEY, /s/ Guilty of money laundering involving the withdrawal of $14,000 from checking account No. 427768039 at Commerce Bank of St. Joseph on or about November 1, 1993, as charged in Count 112 of the indictment.

COUNT ONE HUNDRED AND THIRTEEN

We, the jury, ind the defendant ROCHELLE K. WHATLEY, /s/ Not Guilty of money laundering involving a the withdrawal of $17,000 from checking account No. 427768039 at Commerce Bank of St. Joseph on or about December 27, 1993, as charged in Count 113 of the indictment.

/s/ Paula K. Smith
FOREPERSON

Date: /s/ 11/7/96

INSTRUCTION NO. 25

The crime of wire fraud, as charged in Counts 24, 31, 32, 33, 34, 47, 48, 49, 50, 71, 72, 75, 76 and 77 of the indictment has four essential elements, which are:

One, the defendant voluntarily and intentionally participated in a scheme to defraud with knowledge of its fraudulent nature, which scheme is described as follows: Between in or about May, 1993, and continuing until in or about March, the exact dates unknown, the defendant obtained money from customers of Midwest Marketing Concepts, Inc., by knowingly making false affirmative statements to customers including false representations and statements, to wit: that they were guaranteed was valuable, within the context of the group of other possible awards the customer could receive; or that the awards were determined by a random drawing; or that no one in the company, not even the president, knew which award an individual would receive; or by making false statements and representations which contained active concealment of facts material to customers, to wit: that the value of the predetermined award was substantially less than the value of the other awards with which it was grouped; or that the value of the Say No to Drugs promotional material was substantially less than the donation allegedly procuring it; or that the bulk of the donation was never directed to a Say No to Drugs campaign.

Two, the defendant did so with the intent to defraud;

Three, it was reasonably foreseeable that interstate wire communications would be used; and

The signal transmitted need not itself disclose any intent to defraud, nor show on its face that it was transmitted in furtherance of a scheme to defraud. However, it is necessary that the evidence in the case establish beyond a reasonable doubt that the signal was willfully transmitted, or caused to be transmitted, with the intent to help carry out some essential step in the execution of the scheme to defraud that is alleged in the indictment.

Interstate telephone calls which are designed to lull customers into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are interstate wire communications in furtherance of the scheme.

Under the wire fraud statute each separate use of interstate wire communications in furtherance of the scheme to defraud constitutes a separate offense.

The wire fraud counts of the indictment charge that each defendant, along with the other defendants, devised or participated in a scheme. The Government need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and use of interstate wire communications for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and

intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.

It is not necessary that the Government prove that the use of interstate wire communications was intended as the specific or exclusive means of accomplishing the alleged fraud.

For you to find a defendant guilty of the crime charged under Counts 24, 31, 32, 33, 34, 47, 48, 49, 50, 71, 72, 75, 76 and 77, the government must prove all of these essential elements beyond a reasonable doubt as to that defendant and the particular count; otherwise you must find that particular defendant not guilty of this crime under the particular count.

INSTRUCTION NO. 29

The crime of engaging in a monetary transaction in property derived from wire fraud, as charged in Counts 108 through 113 of the indictment, has five essential elements, which are:

One, the defendant, ROCHELLE WHATLEY, knowingly withdrew funds from account No. 427768039 at Commerce Bank of St. Joseph

Two, the withdrawal was of property of a value greater than $10,000 derived from wire fraud as defined in Instruction No. 25;

Three, the defendant ROCHELLE WHATLEY then knew that the withdrawal involved proceeds of a criminal offense;

Four, the withdrawal took place in St. Joseph, Missouri; and

Five, the withdrawal in some way or degree affected interstate commerce.

For you to find the defendant, ROCHELLE WHATLEY, guilty of the crime of money laundering charged under Counts 108, 109, 110, 111, 112 and 113, the government must prove all of these essential elements beyond a reasonable doubt as to that defendant and the particular count; otherwise you must find that particular defendant not guilty of this crime under the particular count.

INSTRUCTION NO. 34

As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Finally, remember that you are not partisans; you are judges judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. But I suggest that you carefully [re]consider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or

competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.

Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.

10.02 DUTY TO DELIBERATE ("Allen" Charge)

As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if in your individual judgment the evidence fails to establish guilt beyond a reasonable doubt, then the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty. Of course the opposite also applies. If in your individual judgment the evidence establishes guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty and if all of you reach that conclusion then the verdict of the jury must be guilty. As I

instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt every essential element of the crime[s] charged.

Finally, remember that you are not partisans; you are judges-judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. But I suggest that you carefully [re]consider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.

[Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.]